IS THE STATUTORY ACTION FOR INJURIES CAUSING DEATH TRANSITORY?

THE question is one of jurisdiction; but, of course, of jurisdiction of the subject-matter and not of the person of the defendant. The word "transitory" is here used in the sense of following the person of the defendant into any territory where he can be served with process so as to effectively give jurisdiction of the person; so that the discussion involves only the power of a court to enforce this particular cause of action arising outside of the State creating the court, and the duty of this court, which is a matter distinct from its power, to determine the controversy according to some law other than its own. The exercise of the power, assuming it to exist, may, to some extent, depend upon considerations of comity; and it may be conceded that statutes, as such, have no extra-territorial force, and that, ordinarily, statutes creating trusts can be enforced only within the State of their enactment. Yet where the exercise of such comity has been in certain cases so uniformly acquiesced in as to have the imperative force of law, excluding all discretion, it should be exercised in other cases logically involving the same principle, even to the extent of enforcing foreign statutory rights, and, at all events, where such rights are not opposed to the public policy of the State of the forum. The argument of inconvenience and unnecessary burden would apply to the enforcement of all causes of action arising out of the State, and may therefore be dismissed as insufficient.

It cannot be doubted that many actions — indeed, all common law actions — that are personal and not local, that is, that might have arisen anywhere, have become transitory. The liability attaches to the person, and follows wherever it goes. It can no longer be evaded by removing from one place to another. As to such actions, jurisdiction of the person includes jurisdiction of the subject-matter. But this proposition may involve a different principle when applied to a cause of action not recognized at common law, and purely the creature of a local statute. Thus, where a statute provides that whenever a person should be killed by the

wrongful act of another, which act, if death had not ensued, would have given the injured party a remedy, the party who would have been liable, if death had not ensued, shall be liable at the suit, say, of the personal representative of the deceased, for the exclusive benefit of the next of kin, it is more difficult to determine in what cases, if any, such an action should be held transitory.

It may be assumed that if the laws of the State where the injury was done and the death occurred afford no remedy, the courts of other States will not grant any, even though their statutes provide one, for similar injuries done in their own State. No instance has been found where an act done in one State, not actionable there, has been declared tortious by the courts of another State. Indeed, the authorities are expressly to the contrary. An act lawful in the place where it is done is lawful everywhere. "The true theory is, that no suit whatever respecting this injury could be sustained in the courts of this State, except pursuant to the law of international comity. By that law foreign contracts and foreign transactions, out of which liabilities have arisen, may be prosecuted in our tribunals by the implied assent of the government of this State; but in all such cases, we administer the foreign law as from the proofs we find it to be, or as, without proofs, we presume it to be. . . . Acts done or neglects occurring there, if they are justified by the law of that State, are justified everywhere; and if these defendants are not liable there, they are not liable here."[1] The statute of the forum has no extra-territorial effect, and there is no presumption in favor of the existence of a similar statute in the State or country where the wrong was committed.[2]

The question under discussion may arise in three general classes of cases. First, where the statutes of the State of the forum, and those of the State where the injury was done, both provide a remedy, and are substantially similar. Secondly, where the statutes of the State of the forum give a different remedy, or a remedy to a different plaintiff, or for the benefit of different persons from the statutes of the State where the injury occurred. Thirdly, where the statutes of the State of the forum provide no

[1] Whitford *v.* Panama R.R. Co., 23 N. Y. 465; Needham *v.* Grand Trunk R.R. Co., 38 Vt. 295, *acc.*

[2] Debevoise *v.* N. Y., L. E., & W. R.R. Co., 98 N. Y. 377; Selma, R., & D. R.R. Co. *v.* Lacy, 43 Ga. 461; Allen *v.* Pitts. & Connellsville R.R. Co., 45 Md. 41.

remedy for similar injuries done in that State, and do not expressly give its courts jurisdiction over such injuries done in other States, which, by their statutes, make such injuries actionable.

In the first of these cases, that plausible argument, at least, does not apply, to the effect that interstate comity is not to be extended to cases calling for the enforcement of claims not recognized by the public policy of the State of the forum, or which are opposed to abstract justice or pure morals. The policy as declared by the respective statutes is the same, and the law of the State will not be pronounced unjust or immoral by its own courts. So that if these statutory actions are ever transitory, they must be so in this case. And yet the authorities, at all events in the principles which they declare, are confessedly conflicting, but perhaps not hopelessly so. The difficulty seems to arise from the fact that the recovery permitted by the statute is not deemed to be a part of the estate of the deceased, subject to his debts,[1] but a trust fund, to be collected by the personal representatives or other trustees, and distributed, differently in different cases, but generally for the benefit of the surviving husband or wife and next of kin.[2] The issue is well stated in McCarthy *v.* Chicago, R. I., & P. Railway Co., 18 Kans. 46, where a plaintiff, qualifying as administrator in Kansas, sues in its courts for injuries done in Missouri, and resulting in the death of his intestate, the statutes of both States giving an action for such injuries, although giving the action to different plaintiffs. "The plaintiff is not amenable to the courts of Missouri; yet if this action is maintainable, the money is to be recovered here, upon the laws of another State, by a person acting in an administrative capacity under the authority of this State, and the fund is then to be distributed by the laws of the sister State." And the Massachusetts, Ohio, Indiana, Missouri, and Kentucky courts seem to agree that where the statute of the State where the injury was done gives the remedy to the personal representatives of the deceased, then no recovery can be had in another State having substantially the same statute, if the plaintiff receives his letters only from the courts of the latter State. And even this has been so held where the death occurred in the State of the forum, the injury having been done in the other State.[3] The

[1] See Perry *v.* St. Joseph & W. R.R. Co., 29 Kans. 420.

[2] Davis *v.* N. Y. & N. E. R.R. Co., 143 Mass. 301.

[3] McCarthy *v.* Chicago, R. I., & P. R'way Co., *supra.*

reasoning of these courts is not uniform. In Indiana, where seduction has been made actionable by statute, jurisdiction was declined in a case where the seduction occurred in another State having a similar statute, and although the illicit intercourse was continued in Indiana. The reasoning of the court in this case, analogous as it is to the matter under discussion, may be used as a proper introduction to its consideration. Only common-law rights, says the court, "or such rights as are recognized as existing by the general usage of civilized nations," can be enforced by comity in a foreign forum.[1] This statement will probably be found too broad, even if it be not the general usage of civilized nations to grant compensation for wrongful acts causing death. Hardly more satisfactory is the reasoning in the leading Kentucky case, where, however, the jurisdiction was declined for what will probably be found to have been a sounder reason than the one stated by the court. "The Legislature of that State [Indiana] has no power to prescribe the duties of a personal representative appointed under the laws of another State, and it would be absurd to suppose that it intended to do so."[2] It does not seem very absurd to suppose that a Legislature would expect any one who accepted the benefits of its statute to submit to its burdens. The Massachusetts doctrine is thus stated by Judge Hoar: "If this be a penal statute, it cannot be enforced beyond the territory in and for which it was enacted. If it gives a new and peculiar system of remedy, by which rights of action are transferred from one person to another, in a mode which the common law does not recognize, and which is not in conformity with the laws or practice of this Commonwealth, there is an equally insuperable objection to pursuing such a remedy in our courts."[3] The first of these reasons is perhaps open to the criticism that the statute under consideration had never been considered penal; and, further, that courts of one State do enforce statutes of other States which are distinctly penal, when the statutes of the two States are substantially similar. See the cases where double damages are given for the killing of cattle by railroads.[4] As to the second of these reasons, it might be said that the "insuperable objection" has been successfully overcome in other

[1] Buckles *v.* Ellers, 72 Ind. 220.

[2] Taylor *v.* Pa. Co., 78 Ky. 348.

[3] Richardson *v.* N. Y. Central R. R. Co., 98 Mass. 85.

[4] Boyce *v.* Wabash R'way Co., 63 Iowa, 70.

States. Finally, we have the Ohio case, which seems to have led the way on its side, and whose fallacy, if any, lies in assuming that if the personal representative be not appointed in the State where the injury was done, a distribution of the recovery cannot be enforced according to the foreign statute. "The jurisdiction of the court under which he [the administrator] acts does not extend to trusts to be carried out in pursuance of the laws of other States; for it may well happen that the next of kin, under the laws of Illinois, may not be the same persons, or take in the same proportion, as under the laws of Ohio. Certainly, to determine who are the *cestui que trusts?* the laws of Illinois must be regarded; and it is therefore the intention of the statute of that State, that the tribunal under which the personal representative in whom the right of action is vested, and upon whom the trust is imposed, is acting, should administer the trust and distribute the fund among the proper parties."[1] But cannot the foreign statutes of distribution be proved in the Ohio courts like any other fact? And cannot its administrator be compelled to distribute the recovery accordingly? It would seem to be a matter of inconvenience rather than lack of power.

The reasoning of these cases is distinctly rejected and departed from by the Federal, New York, Georgia, Iowa, Pennsylvania, and Minnesota courts of last resort. "It is difficult to understand how the nature of the remedy, or the jurisdiction of the courts to enforce it, is in any manner dependent on the question whether it is a statutory or common-law right. A party legally liable in New Jersey cannot escape that liability by going to New York. It would be a very dangerous doctrine to establish that, in all cases where the several States have substituted the statute for the common law, the liability can be enforced in no other State but that where the statute was enacted and the transaction occurred. The common law never prevailed in Louisiana, and the rights and remedies of her citizens depend upon her Civil Code. Can these rights be enforced or the wrongs of her citizens be redressed in no other State of the Union? The contrary has been held in many cases. . . . The courts of New York are as capable of enforcing the rights of the widow and next of kin as the courts of New Jersey. And as the court which renders the judgment for damages in favor of the administratrix can only do so by virtue

[1] Woodard *v.* Michigan South., etc., R. R. Co., 10 O. St. 121.

of the New Jersey statute, so any court having control of her can compel distribution of the amount received in the manner prescribed by that statute."[1] An answer to the objection so strenuously urged, that the recovery is not a part of the estate of the intestate, subject to his debts, apart from the fact that, as an objection to entertaining jurisdiction, its force is not very apparent, would seem to be that property frequently comes to the hands of personal representatives, such as subjects of specific bequests or of statutory exemption, that must go direct to legatees or the family of the deceased; and, as is said by Judge Miller in the Dennick case, "No reason is perceived why the specific direction of the law on this subject may not invest the administrator with the right to receive or recover by suit and impose on him the duty of distributing under that law."

The right of the personal representative appointed *in the State where the injury was done*, to recover in another State, whose statute gives a similar remedy, seems never to have been tested, and seems to be implied, or at least suggested, even by those courts which deny the right to the local administrator. "We do not pass upon the question whether an administrator appointed under the laws of another State having similar provisions of law to section 422 of our Code might or might not maintain an action of this character in this State for the purpose of recovering a fund to be distributed under the laws of the State from whence he derives his appointment."[2] "And we do not hesitate to believe that if another should qualify in Indiana as administrator of appellant's estate, and institute suit against the appellee on the same cause of action set up in this case, the courts of Indiana would promptly decide that the recovery here constituted no bar to that action."[3]

"The plaintiff is the administratrix appointed under the law of Massachusetts. Her right to sue in this Commonwealth, in her representative capacity, is upon causes of action, which accrued to her intestate, or which grew out of his rights of property or those of his creditors. The remedy which the statute of New York gives to the personal representatives of the deceased, as

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[1] Dennick *v.* R.R. Co., 103 U. S. 11. Leonard *v.* Columbia Co., 84 N.Y. 48; Morris *v.* R.R. Co., 65 Iowa, 727; Knight *v.* R R. Co., 108 Pa. St. 250, *acc.*

[2] McCarthy *v.* Chicago, R. I., & P. R.R. Co., *supra.*

[3] Taylor *v.* Pennsylvania Co., 78 Ky. 348.

trustees of a right of property in the widow and next of kin, is not of such a nature that it can be imparted to a Massachusetts executor or administrator, *virtute officii*, so as to give him the right to sue in our courts, and to transmit the right of action from one person to another in connection with the representation of the deceased." [1] "There are serious difficulties in allowing an Ohio administrator to undertake and discharge such a trust conferred by the laws of another State. It would be difficult to maintain that, without legislation, his oath or bond would extend to such a case." [2]

We come now to the consideration of those cases where the statutes of the State where the injury is done give a different remedy, or a remedy to a different plaintiff, or for the benefit of different persons from the statutes of the State of the forum. The authorities furnish, as yet, but few illustrations, the most satisfactory discussion being found in a recent decision of the Supreme Court of Pennsylvania. The point decided was, that where the foreign statute gives the right to sue to the personal representative, even though for the benefit of the widow and next of kin, the widow as such cannot sue in Pennsylvania, although the Pennsylvania statute gives her the right to sue for injuries done in that State, resulting in the death of her husband. The principle approved by the federal courts is accepted and extended, not simply to make the foreign statute determine the cause of action, but also to identify the plaintiff.[3] It must, of course, be true, as the court says, that "it would surely be pushing comity beyond its legitimate bounds to assume to do for the tribunals of New Jersey what they certainly would not do for themselves, — administer the right of one party through a suit brought by another." The same conclusion was arrived at in Limekiller *v.* Han. & St. Jos. R.R. Co., 33 Kans. 83; but it may be doubted if the court was sound on principle in its *dictum* to the effect that inasmuch as the statute of the forum gave a remedy for actions arising in its territory to a different plaintiff from the one named by the foreign statute, no recovery could be had in Kansas for injuries done in the other State. It is difficult to understand how the local statute can be construed into a prohibition of all

[1] Richardson *v.* N. Y. Central, *supra.*

[2] Woodard *v.* Mich. Southern, *supra.*

[3] Usher *v.* West Jersey R.R. Co., Pitts. Legal J'l, Vol. 19, 400.

actions, wherever they might arise, except where brought by the particular plaintiff, designated by the local statute for actions arising locally. And yet this construction was also adopted in Vawter *v.* Mo. Pac., 84 Mo. 679, where it is held that this difference in the statutes makes them substantially dissimilar in import and character; and on this ground the Missouri court distinguishes the federal and the New York decisions. If it be true that the enforcement of rights, arising under foreign statutes, depends entirely upon comity, and that courts, for such reason, will not exercise jurisdiction, except in cases where the policy of the two countries is the same, although no question of abstract justice or pure morals be involved, we must expect to find incongruous results arrived at. Of course, statutes of different States are rarely identical. What divergence of form or substance, then, will exclude the judicial comity? We find, for instance, that the Missouri courts go to the extent of holding that a difference in the nominal plaintiff designated by the statute makes a difference in the public policy sufficient to preclude jurisdiction. On the other hand, the courts in Iowa hold that a statute in one State, limiting the recovery to $5,000 for the benefit of the widow and the next of kin, is substantially similar to its own statute not limiting the recovery, and making it part of the personal estate of the deceased, although not subject to his debts.[1] Truly this seems a narrow and technical distinction, and the reasoning of Justice Miller in the Dennick case looks broader and sounder. When an act is done for which the law of the place says a liability shall ensue, the action being personal, and of the nature recognized as transitory, why should not the defendant be held liable in any court to whose jurisdiction he can be subjected by personal process? And carrying this simple and vigorous principle to its logical conclusion, why should not this liability be enforced in any State or country, even though the liability be statutory and irrespective of the policy of the forum, and independently of any corresponding local statute, there being nothing in the remedy to shock the local sense of justice or morality? This broad doctrine was well applied in the Herrick case, *infra*, where a Minnesota court enforced a liability arising in Iowa, under a statute making a railroad company liable to its employees for

[1] Morris *v* C., R.I., & P. R.R. Co., 65 Iowa, 727.

the negligence of fellow-servants, although the common law had not been changed in Minnesota.

And this brings us to a consideration of our third subdivision; that is, of the cases in which the common law has not been modified, in the State of the forum, on this subject of injuries causing death. It is certainly true that in actions *ex contractu*, no such distinction is made between rights arising under statutes and those existing by common law. There seems to be no doubt that the contractual obligations of stockholders and the charter obligations of incorporators are enforced in other States.[1] And although foreign penal statutes as such may not be enforced, yet where, as in statutes relating to gambling, they create a debt, the cause of action for the debt becomes transitory.[2] Why should not the same rule apply to such statutory actions, *ex delicto*, as are purely remedial, and intended to make compensation, in whole or in part, for a civil injury? As it is said in Herrick *v.* Minn. & St. L. R.R. Co., 31 Minn. 11, "It by no means follows that because the statute of one State differs from the laws of another State, therefore it would be held contrary to the policy of the laws of the latter State. . . . To justify a court in refusing to enforce a right of action which accrued under the law of another State, because against the policy of our laws, it must appear that it is against good morals or natural justice, or that, for some other such reason, the enforcement of it would be prejudicial to the general interests of our own citizens." It hardly seems defensible to hold that the question of public policy shall be deemed involved when it is proposed to enforce a cause of action arising under the statute of another State, as in the case under consideration, and that this principle shall not be deemed involved in actions involving the enforcement of contracts that would have been usurious if made in the State of the forum, although lawful by the *lex loci contractus*.[3] In other words, it is scarcely consistent to enforce a contract that, because of a change of the common law,— that is, the enactment of usury statutes,— would have been illegal if made in the State of the forum, and yet to decline to recognize injuries causing death, although made actionable by statute, in the State where they occurred. Certainly the question of public

[1] See Jessup *v.* Carnegie, 80 N. Y. 441.

[2] Flanagan *v.* Packard, 41 Vt. 561.

[3] See Cutler *v.* Wright, 22 N. Y. 472.

morals is more seriously involved in the former than in the latter case. So that, although there are no authorities to directly support such a proposition, it may fairly be contended that, where a statute, by way of compensation rather than as a penalty, allows a recovery for injuries causing death, that recovery should be enforceable by the party designated by the statute, in the courts of any State or country that can obtain jurisdiction of the person of the defendant.

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NEW YORK, September, 1889.

THE DOCTRINE OF STARE DECISIS AS APPLIED TO DECISIONS OF CONSTITUTIONAL QUESTIONS.

THE doctrine of *stare decisis*, which is firmly imbedded in our law, has, like all general rules and doctrines, many limitations and qualifications. Not every decision is entitled to its application and protection. The following definition has been supposed to present the rule with the ordinary practical qualifications approved by our best law courts: "A deliberate or solemn decision of a court or judge, made after full argument on a question of law fairly arising in a case and necessary to its determination, is an authority or binding precedent in the same court, or in other courts of equal or lower rank within the same jurisdiction, in subsequent cases where the very point is again presented; but the degree of authority belonging to such precedent depends, of necessity, on its agreement with the spirit of the times or the judgment of subsequent tribunals upon its correctness as a statement of the existing or actual law, and the compulsion or exigency of the doctrine is, in the last analysis, moral and intellectual, rather than arbitrary and inflexible." [1]

Accepting this definition, our query is, whether the doctrine ought to be, or is, less strictly applied to decisions of constitutional questions than to questions of mere private right.

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[1] Chamberlain's *Stare Decisis*, p. 19.